

HUMAN RESOURCE ISSUES REGARDING PANDEMIC FLU

Pre-Declaration of Emergency

Below are frequently asked questions regarding employer authority when dealing with personnel issues at the beginning of a pandemic. Information for this document was compiled by the Attorney General's Office, in collaboration with Department of Personnel and the Office of Financial Management Labor Relations Office. This document is provided to employers as an *initial* research and planning tool. There is no way to know exactly what issues may arise if a pandemic occurs, but this document is intended to be used as a starting point. The answers are provided as if there has been *no* declaration of emergency by the Governor. Prior to a declaration of emergency, state rules, regulations, and the collective bargaining agreements (CBA) all remain in effect. If there is a declaration of emergency, some answers below may no longer be relevant.

For guidance, employers are referred to the applicable CBA for represented employees, or the Washington Administrative Code (WAC) for non-represented classified employees. Prior to a declaration of emergency, employers should consult and follow the applicable CBA or WAC when addressing personnel issues. The answers provided for represented employees are based on the current general government CBAs. For questions regarding exempt employees, employers should consult with the assigned Labor and Personnel assistant attorney general.

As stated previously, these questions and answers are only a sample of the types of questions that employers may need to address during a pandemic. Public safety is important, and employers may face difficult decisions during a developing health crisis. Management should make decisions as it deems appropriate under the circumstances but be aware that the union(s) may demand to bargain the effects of the decision. Each case will be fact-specific and each employer may have different needs; therefore, employers are encouraged to contact the assigned Labor and Personnel assistant attorney general prior to taking action.

1. If an employer requires an employee to leave the work site due to a developing health crisis, such as a pandemic flu, must the employer pay the employee? Does it make a difference if the building is ordered to be closed?

If an employer determines an employee should not be at the work site, the employer must review the applicable collective bargaining agreement (CBA) or WAC to determine the specific management rights regarding that employee.

Under the collective bargaining agreements if the employer determines a work location is non-operational, the employer **may** have several options, including: releasing employees with pay, assigning employees to another work location, or implementing a temporary layoff. An employer must comply with the applicable CBA regarding assigning to another work location or implementing a temporary layoff.

This document does not contain an official opinion of the Attorney General, and should not be relied upon for that purpose.

For non-represented employees, WAC 357-31-260 through 357-31-280 provides several options. Employers should also consult their suspended operations procedure, as required in WAC 357-31-275. Temporary layoff may also be an option for non-represented employees. WAC 357-46-063 through 357-46-068 addresses temporary layoff. See question number 6 below for more information about temporary layoff.

2. Can an employer require an employee to leave the work site because the employer has determined the employee is sick or has been potentially exposed to those who are sick? Must the employer pay the employee? What are the options if the employee has no accrued leave?

There is no clear authority to require employees to leave the work site under these circumstances. An employer should only consider such steps if there is clear, objective evidence of the employee's illness or exposure. An employer should consider contacting the local health department to determine symptoms of the alleged illness prior to taking action. An employer could assign the employee to work from home to limit exposure to other employees without violating the CBAs or WAC.

Another alternative intended for groups of represented employees may be to implement a temporary layoff based on unexpected or unusual reasons. An employer should consult the applicable CBA for the specific requirements, and discuss the facts with their assigned Labor and Personnel assistant attorney general or assigned labor negotiator. (*Also see Answer 3.*)

For non-represented employees, WAC 357-46-063 and WAC 357-46-010 provide the basis for temporary layoff. Since the WACs do not provide an option to lay off an employee due to "unexpected or unusual reasons," an employer should consult with the assigned Labor and Personnel assistant attorney general prior to taking such action.

3. Can an employer require an employee to work from home? Do public disclosure issues arise if an employee uses a home computer for state work?

Pursuant to the management rights article in most of the CBAs, an employer has broad discretion to assign a represented employee to work from home. The employee would have to be paid for the work. An employer should review the applicable CBA language, prior to making the assignment.

For non-represented employees - the WACs do not limit an employer's authority to assign an employee to work from home.

Employers should review agency needs and determine which positions could work from home and how to provide appropriate technical support.

Prior to assigning an employee to work from home, an employer should review possible public disclosure issues with the employee. Employees should be required to use RAS (Remote Access System) accounts, flash drives, or RAS-enabled employer computers. Employees should be informed to not save or retain any employer files on their personal computers.

All employers should make appropriate preparations now to provide computer access to essential employees during a developing health crisis, such as a pandemic flu. Employers should consult with agency IT employees to determine the limitations of RAS during widespread statewide use.

4. Can an employer order employees to stay home, in order to stay healthy, so that they can report back to work in X number of days or weeks?

An employer has no authority to restrict where the employee goes outside of work hours. As stated above in Answer 3, an employer may reassign an employee to work from home in accordance with the applicable CBA or WAC.

An employer may also implement an alternate work schedule according to the CBAs. An employer should review the applicable CBA to abide by the specific requirements and limitations. All of the CBA's allow an employer to change an employee's assigned hours, temporarily or permanently. An employer should consult the applicable CBA for the specific requirements, and discuss the facts with their assigned Labor and Personnel assistant attorney general or assigned labor negotiator.

For non-represented employees, WAC 357-28-252 allows an employer to change an employee's assigned hours, temporarily or permanently. A temporary change in schedule of 30 days or less can be implemented without prior notice. An employer should review the WAC to abide by the specific requirements and limitations.

5. Can an employer order an employee not to return to work if the employee has been ill or exposed to disease, and could potentially expose coworkers or clients?

Under the CBAs, if an employee is returning to work after a sick leave absence, an employer may require written certification from a health care provider regarding the employee's ability to return to work and ability to perform the essential functions of the job. If an employee is unable to return to work, but is not personally ill, an employer may want to review other options, such as reassigning the employee to work from home. In either case, an employer should carefully review the applicable CBA.

Pursuant to WAC 357-31-130, an employer may require medical certification in accordance with the employer's leave policy. An employer should review the leave policy for specific criteria prior to requesting certification from an employee.

6. Can an employer temporarily lay off non-essential employees during a developing health crisis, such as a pandemic flu? Are employees paid during a temporary layoff? Do notice requirements still apply in a developing health crisis?

A temporary layoff may be used if a developing health crisis, such as a pandemic flu, is expected to be resolved within 30 days. An employer should consider business needs as well as the impact on employees prior to implementing a temporary layoff.

Under the CBAs, if a temporary layoff is implemented, the employees are not paid after the notice period, but in some circumstances employees may be entitled to use accrued leave balances. The notice requirements for a temporary layoff, if any, are provided in the CBAs. An employer should review the applicable CBA prior to implementing a temporary layoff.

For non-represented employees, WAC 357-46-063 through WAC 357-46-068 describes the limitations of a temporary layoff. Non-represented employees are not paid for hours not worked during a temporary layoff. WAC 357-46-067(2)(c) provides that the employee is not entitled to use vacation leave if the layoff is due to lack of funds. If for any other reason, the employer may allow the employee to use their vacation leave. Sick leave cannot be used. Pursuant to WAC 357-46-066, employers must provide seven calendar days notice to an employee. If an employer determines a non-essential employee should not come to the work site during the seven days notice, the employee must be paid.

7. Can an employer require essential staff to come to work? What action can be taken if employees refuse to report for duty?

All employees are expected to report to work unless properly excused. Although the employer designates which employees are essential, employees should be consulted about the effects of that determination and the employer should reasonably consider the impacts. For example, if spouses/domestic partners work for the same employer and are both potentially essential employees, an employer should ordinarily identify which is more critical to the employer and designate accordingly. In order to encourage all employees to come to work, employers should educate employees about the precautions the employer has taken to help protect the employee's health. Employers should seek information from local health departments regarding appropriate precautions.

Pursuant to the CBAs, if an employee fails to report for work, an employer may start the disciplinary process under the “just cause” standard, when appropriate. If an employee has been absent without authorization and has not contacted the employer, an employee may be presumed to have resigned. Review applicable CBA for specific requirements and limitations.

WAC 357-46-210 through WAC 357-46-220 authorizes an employer to separate a non-represented employee who has been absent without authorized leave for three consecutive work days.

When an employee does not report for duty, an employer’s goal of maintaining adequate staff should be considered prior to implementing disciplinary action. It may be in an employer’s best interest to consult with employees to determine if alternate work arrangements can be agreed upon.

- 8. What action can be taken if an employee refuses to perform a specific assignment within the position’s essential functions due to the potential health risk of coming into contact with sick people? (E.g., transporting a sick person; working at a customer service window; providing direct care in a state facility; working in a quarantine area, etc.)**

Prior to taking any action, an employer should address the potential health risk and take appropriate action to minimize exposure (e.g. alterations to physical work environment, revisions in work procedures, or protective equipment such as screens or possibly gloves or masks). If the employee is unwilling to perform the assignment even with the precautions, the employer should determine if there are other alternatives. An employer should consider their goal of maintaining adequate staff, and may choose to reassign the task to another employee.

As a final option, for represented employees, the employer could pursue the disciplinary process under the “just cause” standard, in accordance with the applicable CBA.

For non-represented employees, disciplinary action could be pursued in accordance with WAC 357-40.

- 9. Does the employer have the authority to order employees to remain at work in order to minimize exposure?**

Neither the CBAs nor the WAC provide an employer with authority to keep an employee at the work site beyond normal work hours for the purpose of quarantine. An employer may consult with local health departments regarding the need for quarantine.

10. Does an employer have the authority to require an employee to work overtime in order to perform critical functions of the employer in a developing health crisis, such as a pandemic?

An employer's authority to require overtime of an employee is limited in accordance with the applicable CBA or WAC.

Overtime for represented, overtime-eligible employees should be implemented in accordance with the applicable CBA. An employer should review the CBA for limitations prior to requiring an employee to work overtime.

For non-represented employees, WAC 357-28-220 allows an employer to assign work hours outside of the regularly scheduled shift. WAC 357-28-252 defines the employer's authority to change an overtime-eligible employee's assigned shift. WAC 357-28-255 defines overtime.

11. Can an employer require an employee to work out of a different office within a reasonable commuting distance? For how long?

An employer may require an employee to work out of another office for as long as necessary if the location is within reasonable commuting distance, as defined by employer policy or applicable CBA.

Most CBAs, under the management rights article, authorize an employer to determine the location of offices and work sites, temporarily or permanently. An employer should review the applicable CBA prior to requiring an employee to work out of a different office. An employer should review the Office of Financial Management regulations regarding mileage and per diem prior to requiring an employee to temporarily work out of another office.

For non-represented employees, the WAC does not specifically address assigning an employee to a different location in their current position. Before making a permanent change, employers should consider the impact to employees. For a temporary change, the alternate location would be treated as the work assignment for the day - similar to assigning the employee to attend an off-site training session or an off-site meeting. In this situation, the employee is in travel status which means the employer would be responsible for mileage, per diem, and overtime if applicable.

12. Can an employer reassign an employee to a location not within a reasonable commuting distance (E.g., work in Eastern Washington)?

If the employer wants the employee to temporarily work at a location beyond a reasonable commuting distance, the employer must pay mileage, per diem, and overtime if applicable, pursuant to Office of Financial Management regulations. An employer should consider the employee's personal obligations when making the decision to reassign outside of a reasonable commute.

If the reassignment is permanent, the employee may have notice and layoff rights. Review the applicable CBA for requirements for represented employees.

For non-represented employees, "reassignment" means a move from one position to another position in the same class. WAC 357-19-175 addresses reassignment to a different geographic location. If the reassignment is not within a reasonable commute, and the employee does not agree to the reassignment, the employer is authorized to implement a layoff.

For non-represented employees if the change in work location does not involve a change in position, the WAC on "reassignment" would not apply. As noted earlier, the WAC does not limit the employer's ability to assign an employee to work at a different location in their current position. For temporary changes to work location, the alternate work location would be treated as the work assignment for the day, similar to what occurs when an employee is sent to a training session or an off-site meeting. In this situation, the employee is likely to be in travel status which means the employer would be responsible for mileage, per diem, and overtime if applicable.

13. Does an employer have to provide food and a place to rest for employees who are required to remain at work for extra long shifts?

An employer that requires employees to remain on site for extended hours should provide food and a place to rest. The Fair Labor Standards Act (FLSA) requires that the employee be given the opportunity to have additional breaks, lunch, etc., depending on how long the employee works. If an employer anticipates the functions of the employer may require employees to remain at work for an extended period of time, the employer should review the applicable CBA (for represented employees) and, if necessary, implement an appropriate policy. Even in a developing health crisis, an employer must comply with FLSA, the rules of the Washington State Department of Labor and Industries (LNI), and the applicable CBA for represented employees.

In addition, an employee may have a defense to disciplinary action, implemented for the employee leaving the work site if an employer does not provide adequate food or rest provisions.

14. What is an employer's authority to require employees to be vaccinated?

Absent specific statutory or regulatory authority, an employer has no authority to require an employee be vaccinated. If an employer is concerned regarding the spread of a specific disease, the employer should consult with the local health department.

15. In a developing health crisis, such as a pandemic flu, can an employer rescind previously approved leave?

Some of the CBAs authorize an employer to cancel approved vacation leave in case of an emergency. No specific authority is provided to rescind sick leave or personal holiday leave. An employer should carefully review the applicable CBA prior to rescinding vacation leave.

For non-represented employees, in accordance with WAC 357-31-100, an employer must develop a leave policy. An employer should review the leave policy prior to taking any action to rescind leave. In addition to the leave policy, an employer should also review the applicable WAC. WAC 357-31-205 states that an employer must consider the needs of the employee but may require that vacation leave be taken when it will least interfere with the operational needs of the employer. If operational needs change after leave has been approved due to a developing health crisis, an employer may be able to rescind vacation leave. However, leave should not be rescinded by an employer if it was required to be approved pursuant to WAC 357-31-130 (sick leave), WAC 357-31-200 (vacation leave), or WAC 357-31-070 (personal holiday).

16. Can sick leave pools be created at the employer or state level to assist employees who have exhausted their leave?

The CBAs do not authorize sick leave pools for represented employees.

WAC 357-31-570 through WAC 357-31-635 grants employers the ability to create sick leave pools for non-represented employees.

17. Can an employer share employees with other employers? How would rate of pay be determined if the position at the other employer is different?

There is statutory authority for public agencies to share resources. Pursuant to RCW 39.34.060, any public agency may appropriate funds and may sell, lease, give, or

otherwise supply personnel to the administrative joint board or other legal or administrative entity created to operate a joint or cooperative undertaking authorized by law. An employer should carefully review RCW 39.34 and sources of agency authority prior to implementing a shared employee agreement.

For represented employees, an employer should review the applicable CBA and consult with the assigned OFM-LRO representative prior to entering a shared employee agreement.

For non-represented employees, an employer should consult with the Rules Office of the Department of Personnel prior to entering into a shared employee agreement.

18. Under what circumstances will all or part of the CBA be suspended?

For general government employers, the CBAs will only be suspended through a declaration of emergency by the Governor. A general government employer does not have independent authority to suspend any part of the CBAs. Prior to a declaration of emergency, employers will likely be consulted as to what agency issues need to be addressed if their operations are suspended.

19. Under what circumstances will all or part of the Civil Service Rules be suspended?

The Director of Department of Personnel has the authority to amend or repeal civil service rules in accordance with the Administrative Procedures Act (Chapter 34.05 RCW). Beyond that the Governor may suspend all or part of the rules or the civil service law, if the civil service law impedes the state's ability to carry out essential services or respond to the disaster, through a declaration of emergency. A general government employer does not have independent authority to suspend any part of the rules. Prior to a declaration of emergency, employers will likely be consulted as to what agency issues need to be addressed if their operations are suspended.